No. 87-415

(3)

FILED
OCT 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NORTHERN PLAINS RESOURCE COUNCIL;
TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION;
ROSEBUD PROTECTIVE ASSOCIATION; and
TRI-COUNTY RANCHERS ASSOCIATION,
Petitioners,

v.

THE UNITED STATES OF AMERICA;
THE INTERSTATE COMMERCE COMMISSION; and the
TONGUE RIVER RAILROAD COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

THOMAS E. EBZERY *
Village Center 1
Suite 165
1500 Poly Drive
Billings, MT 59102
(406) 245-4881

W. H. BELLINGHAM
MOULTON, BELLINGHAM, LONGO & MATHER, P.C.
200 Securities Building
P.O. Box 2545
Billings, MT 59103
(406) 248-7731

DAVID M. SCHWARTZ
ROBERT L. CALHOUN
SULLIVAN & WORCESTER
Suite 806
1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 775-8190

Attorneys for Respondent Intervenor Tongue River Railroad Company

* Counsel of Record

October 8, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
HISTORY OF THE CASE	2
ARGUMENT	2
A. The Petitioners are not within the "Zone of Interest" Sought to be Protected by Section 2(c)	4
B. Other Grounds Advanced By the Petitioners Have No Merit	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 3, 6, 7
Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 3, 6
Center for Auto Safety v. NHSTA, 793 F.2d 1322 (D.C. Cir. 1986) 8
Clarke v. Securities Industry Association, —— U.S. ——, 107 S.Ct. 750 (1987) 3, 6, 7
Investment Company Institute v. Camp, 401 U.S. 617 (1971) 6
Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. ——, 106 S. Ct. 2860 (1986) 6, 8, 9
L. Singer & Sons v. Union Pacific Railroad Co., 311 U.S. 295 (1940) 9
National Coal Association v. Hodel, 825 F.2d 523 (D.C. Cir. 1987) 5, 6
Northern Indiana Public Service Commission v. Carbon County Coal Co., 799 F.2d 265 (7th Cir. 1986) 4, 5, 6
Northern Plains Resource Council, et al. v. Interstate Commerce Commission, et al. (No. 86-7344) 9th Circuit (May 12, 1987) 2
Pepsico, Inc. v. FTC, 472 F.2d 179 (2nd Cir. 1972) 8
Pittsburgh & W. Va. Ry. v. United States, 281 U.S. 479 (1930) 8
United States v. Elgin, Joliet & Eastern Ry. Co., 298 U.S. 492 (1936) 5
Wirth v. Seldin, 422 U.S. 490 (1975) 3
Water Transport Ass'n v. ICC, 819 F.2d 1189 (D.C. Cir. 1987) 3, 9

STATUTES

28 U.S.C. § 2344 9
Administrative Procedure Act, 5 U.S.C. § 702 9
Mineral Lands Leasing Act, 30 U.S.C. § 202 ..... *passim*

MISCELLANEOUS

58 *Congressional Record* 4739 (1919) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-415

NORTHERN PLAINS RESOURCE COUNCIL;
TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION;
ROSEBUD PROTECTIVE ASSOCIATION; and
TRI-COUNTY RANCHERS ASSOCIATION,
Petitioners,

v.

THE UNITED STATES OF AMERICA;
THE INTERSTATE COMMERCE COMMISSION; and the
TONGUE RIVER RAILROAD COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Intervenor Tongue River Railroad Company (TRRC) agrees in general with Petitioners' "Statement Of The Case." However, Petitioners have inaccurately stated the basis for their appeal of the Interstate Commerce Commission's [variously ICC or the Commission] decision to the Court of Appeals by implying that environmental issues were the basis of appeal to the Court of Appeals (Petitioners' Brief p. 3-4). Petitioners initially opposed the TRRC applications to the Commission on several grounds, one of which was environmental.

However, in their appeal to the entire Commission, Petitioners did not appeal "the discussions and conclusions in the FEIS [Final Environmental Impact Statement] Mitigation Plan, or to the relevant analysis and conclusions in the initial decision [of the Administrative Law Judge]." Supp. App., p. 21d. The Petitioners did not seek review of the Commission's decision to the Court of Appeals on environmental grounds. Rather, the Court of Appeals expressly found that "the sole issue challenged by the NPRC on appeal is whether the ICC's decision violates section 2(c) of the Mineral Lands Leasing Act, 30 U.S.C. 202. We dismiss the appeal because the appellants lack standing to sue under section 2(c)." *Northern Plains Resource Council, et al. v. Interstate Commerce Commission, et al.*, No. 86-7344, 9th Circuit Court of Appeals, reprinted as Appendix A to Petitioners' Brief, p. 2A.

HISTORY OF THE CASE

Respondent Intervenor TRRC generally agrees with Petitioners' "History Of The Case." However, the continued reference to environmental matters and other grounds for appeal appears to be a veiled attempt to expand the single issue before this Court. Petitioners sought review in the Court of Appeals of the Commission's decision which they alleged countenanced a violation of Section 2(c) of the Mineral Lands Leasing Act, and on no other issue.

ARGUMENT

This case does not present any issue warranting review by this Court. The sole issue presented by the Petitioners for review is whether the Court of Appeals' decision denying standing to sue under section 2(c) of the Mineral Lands Leasing Act, 30 U.S.C. § 202, hereinafter "section 2(c)", is inconsistent with, and in conflict with recent decisions of this Court. The Petitioners have cited five cases as the basis for their contention that the Court of Appeals erred in its decision. As will be shown, close

scrutiny of these five cases discloses no support for the Petitioners' assertion.

In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970), this Court cautioned that "[g]eneralizations about standing to sue are largely worthless as such." Rather, in that and subsequent decisions where standing was a major concern, the Court has recognized that a more searching inquiry is required. Where, as here, the construction of a statute is involved "[t]he essential inquiry is whether Congress intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law." *Clarke v. Securities Industry Association*, —— U.S. ——, 107 S. Ct. 750, 757 (1987), quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984).

In making this determination, this Court has consistently considered three elements: (1) whether the complaining party has suffered an "injury in fact" fairly traceable to the administrative action complained of; (2) whether the interests involved are arguably within the "zone of interests" sought to be protected by the statute or constitutional guarantee; and (3) whether Congress has manifested an intent to withhold judicial review from the class to which the complaining party belongs. *See, Clarke v. Securities Industry Ass'n, supra*, 107 S. Ct. at 754-757; *Block v. Community Nutrition Institute, supra*, 467 U.S. at 351 (*Block*); and *Association of Data Processing Organizations, Inc. v. Camp, supra*, 397 U.S. at 153. Unless all three elements are satisfied, the complaining party must be denied standing. *See, Wirth v. Seldin*, 422 U.S. 490, 499-500 (1975), and *Water Transport Ass'n v. ICC*, 819 F.2d 1189, 1192-1196 (D.C. Cir. 1987) (discussing and applying standard requirements in denying standing to a trade association contesting an adverse decision of the ICC). In dismissing the Petitioners' claim, the Court of Appeals found that the Petitioners did not fall within the "zone of interest"

to be protected by section 2(c). Thus, it was unnecessary for the Court of Appeals to apply the two remaining elements of the test.[1]

A. The Petitioners are not within the "Zone of Interest" Sought to be Protected by Section 2(c).

The Court of Appeals found that the Petitioners were not within the "zone of interests" intended to be protected by Congress in enacting section 2(c) of the Mineral Lands Leasing Act. (App. A, p. 3a) In reaching this conclusion, the court found that the purpose of section 2(c) was, in the court's words, ". . . because of a concern that, if railroads were allowed to own coal mines, they would discriminate in their rates for transportation against competing coal mines which depend on rail transportation." (*Id.*, p. 4a) In support of this conclusion, the court referenced the remarks of Senator LaFollette, a primary sponsor of the legislation that ultimately became section 2(c), *see* 58 *Congressional Record* 4739 (1919), and cited, with approval, the opinion of the Seventh Circuit in *Northern Indiana Public Service Commission v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986), which extensively discussed the history and purpose of section 2(c).

Although Petitioners argue strenuously that the decision of the ICC violates section 2(c) and that they have standing to raise that claim (Petitioners *Brief* at p. 15), nowhere do they point to any judicial decision, express statutory language, or the legislative history of section 2(c) which supports this claim for the simple reason that there is none.

---

[1] Petitioners assert that the Court of Appeals recognized that petitioners "were adversely affected or aggrieved by the ICC decision." (Petitioners' Brief, p. 8) The Court of Appeals made no such finding of fact. The Court of Appeals found only that the Petitioners were landowners "arguably affected by the ICC's decision." (App. A, p. 4a)

Section 2(c) has never been authoritatively considered by this Court.[2] However, it has been addressed recently by the Court of Appeals for the District of Columbia Circuit in *National Coal Association v. Hodel*, 825 F.2d 523 (D.C. Cir. 1987). In *Hodel*, the Court of Appeals was presented with a challenge to a decision of the Secretary of the Interior consenting to a complicated exchange of public lands involving, among other things, the grant of a tract of public coal-bearing land to an affiliate of a railroad which, it was argued, violated section 2(c). The court, in determining its jurisdiction, discussed at some length whether the plaintiff, a trade association of major coal producers, had standing to assert a claim under section 2(c). The court found in *Hodel* that the plaintiff, as a coal producer association, had standing to sue under section 2(c) since they met the "zone of interest" test.

> The legislative history of section 2(c) provides a sufficient basis for locating plaintiffs within its protected zone. It was enacted out of fear 'that if railroads were allowed to own coal mines they would discriminate in transportation against competing coal mines which depended on rail transportation . . . .' *Northern Indiana Public Service Company v. Carbon County Coal Co.*, 799 F.2d 267, 271 (7th Cir. 1986) (balance of citation omitted)
>
> * * * *
>
> Since 'Congress [has] arguably legislated against the competition that the [plaintiffs] seek to chal-

---

[2] This Court has, however, on several occasions addressed the background and strength of analogous federal policies reflected in the so-called "commodities clause", 49 U.S.C. § 10746, which restricts railroad ownership of commodities shipped by them. This provision, which is not an issue in this case, does not apply to affiliates of railroads unless one is the alter ego of the other. See United States v. Elgin, Joliet & Eastern Ry. Co., 298 U.S. 492, 501-04 (1936). Also see National Coal Association v. Hodel, infra, 825 F.2d at 526 (discussing the policy of the commodities clause in the context of section 2(c)).

> lenge,' plaintiffs have asserted an interest that bears a 'plausible relationship to the policies underlying the MLA. *Clarke*, 107 S.Ct. at 759 (quoting *Investment Company Institute*, 401 U.S. at 620). That is enough.[3] 825 F.2d at 527.

Petitioners suggest, in effect, that the Court should expand the 2(c) "zone of interest" test applied in *Hodel*. They cite the recent decision of this Court in *Clarke v. Securities Industry Association*, *supra*, for the proposition that the Court of Appeals' holding is at variance with this Court's trend to enlarge the class of persons with standing to appeal a judicial decision. [Petitioners' Brief p. 7]

As noted by the Petitioners, *Clarke* was decided after the Court of Appeals decision in this case. [Petitioners Brief, p. 12, n.4]. Nonetheless, Respondent Intervenor submits that the Court of Appeals decision in this case is fully consistent with *Clarke*.

In *Clarke*, *supra*, 107 S. Ct. at 756, this Court observed that "[t]he 'zone of interest' formula in *Data Processing* has not proved self-explanatory, but significant guidance can nonetheless be drawn from that opinion." [Footnote omitted.] In their broad and sweeping criticism of the decision of the Court of Appeals, Petitioners have made no effort to draw any real "guidance" from *Clarke* or other decisions of this court including *Data Processing*, *supra*, *Block*, *supra*, and *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. ——, 106 S. Ct. 2860 (1986). Although replete with quotations and citations from these opinions, the Petitioners' argument fails to

---

[3] The recent decision of the Seventh Circuit in Northern Public Service Commission v. Carbon County Coal Co., supra, is instructive of Congressional intent of section 2(c). In its ruling, the court discussed at length the history and purpose of section 2(c). It concluded that Congress had not intended that section 2(c) be enforced through a private suit by claims irrelevant to its purpose. See 799 F.2d at 271-273.

recognize that the "zone of interest" test is not a talismanic formula of indiscriminate application. Rather, it requires an evidentiary determination of particular facts and statutes involved in a particular case. For example, in *Clarke*, *supra* and *Data Processing*, *supra*, the Court undertook such a detailed analysis of the particular statutes involved. In both cases, the Court found that, although the legislation did not expressly provide for judicial review, the analysis supported the parties' claim that they were within the "zone of interest" that Congress sought to protect. As the Court explained in *Clarke*, *supra*, 107 S.Ct. at 759,

> 'Congress [has] arguably legislated against competition that [respondent seeks] to challenge.' *Investment Company Institute*, 401 U.S. at 620, 91 S.Ct. at 1093, by limiting the extent to which banks can engage in the discount brokerage business and hence limiting the competitive impact on nonbank discount houses.

In contrast, no such right was found in *Block*, *supra*, holding that consumers, even though affected by the impact of the milk marketing orders issued by the Secretary of Agriculture, lacked standing to contest those orders. *See*, 467 U.S. at 348.

The Court of Appeals gave careful consideration to the distinctions made in these cases. *See*, App. A, p. 3a-4a. In contrast, the Petitioners treat all of these decisions as a seamless web without distinction when such is not the case. In doing so, the Petitioners assert that the decision of the Court of Appeals is "contrary to the trend enunciated by this Court in its decisions which enlarges that class," citing *Data Processing*, *supra*. [Petitioners' Brief, p. 7]. Petitioners are simply wrong in this assertion for, as the Court pointed out in *Clarke*, *supra*, 107 S.Ct., at 757,

> In cases where the plaintiff is not itself the subject of the contested action, the [zone of interest] test

> denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes *implicit* in the statute that it cannot be reasonably assumed that Congress intended to permit the suit. [emphasis added]

There is nothing "implicit in the statute" [section 2(c)] at issue here that demonstrates any intent on the part of Congress to confer a right of action on the landowner interests represented by the Petitioners. Thus, the Court of Appeals was clearly correct in holding that the appellants "are not within the 'zone of interests' protected by section 2(c)." App. A, p. 4a.

B. Other Grounds Advanced By the Petitioners Have No Merit.

As discussed above, the Court of Appeals did not find it necessary to apply the two remaining elements of the standing test. However, the Petitioners seem to argue the contrary. They cite *Japan Whaling Ass'n v. American Cetacean Soc., supra*, for the proposition that their participation in this case "presumptively" entitles them to judicial review (Petitioners' Brief, at p. 13). That the Petitioners were a "party" to the proceedings before the Commission is not in dispute. However, it is well settled that the mere fact that a party participated in a proceeding before the Commission does not in and of itself confer a right of action in the courts. *Pittsburgh & W. Va. Ry. v. United States*, 281 U.S. 479, 486 (1930). *Also see, Center for Auto Safety v. NHSTA*, 793 F.2d 1322, 1329 (D.C. Cir. 1986), applying *Pittsburgh* in a contemporary setting. As put by the Second Circuit in *Pepsico, Inc. v. FTC*, 472 F.2d 179, 186 (2nd Cir. 1972),

> The notion that being a 'party' before an agency either automatically confers or is a necessary condition of the right to judicial review has in fact been dead since [*Pittsburgh*].

For Petitioners to prevail, they must first show that they are an "aggrieved" party under section 10 of the

Administrative Procedure Act, 5 U.S.C. § 702, and 28 U.S.C. § 2344, which governs judicial review of the Commission's orders. To be an aggrieved party, they must first satisfy the traditional "zone of interest" test of standing discussed previously. *See*, pp. 4-8 herein *supra*; *Water Transport Ass'n v. ICC*, 819 F.2d 1189, 1193-97 (D.C. Cir. 1987). This Court held the parties to such a test in *Japan Whaling Ass'n*, *supra*, finding first that the respondent was sufficiently "aggrieved" by the agency's action and that it had suffered an "injury in fact" (*Japan Whaling Ass'n*, *supra*, p. 8 n.4).[4] Therefore, that decision offers no support for the relief sought by Petitioners in this case.

---

[4] Petitioners also cite this Court's decision in L. Singer & Sons v. Union Pacific Railroad, 311 U.S. 295 (1940) to show what interests one has to assert to obtain "standing" under the Transportation Act of 1920. This cause arose over a complaint by a shipper that the defendant railroad was constructing new rail facilities to a competitor without prior approval of the Commission, as required under former sections 1(18)-(21) of the Interstate Commerce Act, now 49 U.S.C. § 10901. The Court affirmed the Circuit Court stating that the Petitioners there, as a competing shipper, were without "standing" to maintain the suit as "parties in interest".

As explained in Singer, 311 U.S. at 304, "an individual may have some peculiar interest which may be directly and materially affected by alleged unlawful action". The Court concluded the "legal interest" test by stating, "If such circumstances are shown he may sue; he is then 'party in interest' within the meaning of the statute. In the absences of the circumstances he is not such a party". Ibid.

Even though the "legal interest" test has been superseded by the "zone of interest" test first set forth in Data Processing, *supra*, the result would be the same. As explained above, Petitioner has not shown to any court that it has any peculiar interest which may be directly and materially affected by the alleged unlawful action.

CONCLUSION

In view of the foregoing, this case clearly does not warrant review by the Court.

Respectfully submitted,

THOMAS E. EBZERY *
Village Center 1
Suite 165
1500 Poly Drive
Billings, MT 59102
(406) 245-4881

W. H. BELLINGHAM
MOULTON, BELLINGHAM, LONGO
& MATHER, P.C.
200 Securities Building
P.O. Box 2545
Billings, MT 59103
(406) 248-7731

DAVID M. SCHWARTZ
ROBERT L. CALHOUN
SULLIVAN & WORCESTER
Suite 806
1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 775-8190

Attorneys for Respondent Intervenor
Tongue River Railroad Company

October 8, 1987

* Counsel of Record